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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-221

RUTH ROBINSON, - - - - - - Petitioner,

versus

THE BOARD OF REGENTS OF EASTERN KENTUCKY UNIVERSITY, a Body Corporate, and
ROBERT R. MARTIN, President of Eastern Kentucky University - - - Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

BERT T. COMBS
CHARLES R. SIMONS
1700 Kentucky Home Life Building
Louisville, Kentucky 40202

JOHN W. PALMORE
P. O. Box 727
Eastern Kentucky University
Richmond, Kentucky 40475

Counsel for Respondents

WESTERFIELD-BOOTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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v.

THE BOARD OF REGENTS OF EASTERN KENTUCKY UNIVERSITY, a Body Corporate, and
ROBERT R. MARTIN, President of Eastern Kentucky University, - - *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion delivered in the Court below is reported at 475 F. 2d 707 and is appended to the Petition for a Writ of Certiorari at page 15. The decision of the United States District Court for the Eastern District of Kentucky is not officially reported, but its Findings of Fact and Conclusions of Law are appended to the Petition for a Writ of Certiorari at page 25.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

The constitutional provision and regulations involved are as set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the adoption and enforcement by a public university of dormitory hour regulations is a proper subject for judicial intervention?

2. Whether a public university may, consistent with the equal protection clause of the Fourteenth Amendment, establish different dormitory hour regulations for male and female students?

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct.

ARGUMENT

I.

The Adoption and Enforcement by a Public University of Dormitory Hour Regulations Is Not a Proper Subject for Judicial Intervention.

Dormitory hour regulations adopted by the Board of Regents and presently in effect at Eastern Kentucky University require a first semester female stu-

dent to be in her dormitory by midnight Sunday through Thursday and by 2:00 A.M. on Friday and Saturday nights; after the first semester, female students under the age of twenty-one may have self-regulated hours with parental permission.[1] Male students under the age of twenty-one have unrestricted dormitory hours. Although petitioner was a freshman student at the time this action was instituted, she was a sophomore and had obtained parental permission to have and, in fact, did have self-regulated hours at the time her action was dismissed by the District Court. Petitioner thus no longer has any interest in that portion of the University's regulation pertaining to first semester female students; her claim is based solely upon the fact that female students under twenty-one are required to obtain parental permission to have self-regulated dormitory hours (which permission petitioner has obtained) while male students need not obtain such permission.

A public college or university has wide discretion in formulating rules and regulations and general standards of conduct for students, and the judiciary should interfere only where there is a clear case of constitutional infringement. See *Bright* v. *Nunn*, 448 F. 2d 245 (6th Cir. 1971); *Esteban* v. *Central Missouri State College*, 415 F. 2d 1077 (8th Cir. 1969), *cert.*

[1]The regulations also require female students having self-regulated hours to pay a fee of $10 per semester. The District Court found this fee necessary to defray the cost of security guards and additional monitoring service for those dormitories which remain open all night. The dormitories housing male students do not have the benefit of these services, and petitioner made no contention in the Court of Appeals that this fee was improper.

denied, 398 U. S. 965 (1970). As expressed by this Court in *Epperson* v. *Arkansas,* 393 U. S. 97, 104 (1968), "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. * * * Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." Relying upon *Epperson,* the Fourth Circuit aptly stated in *Sword* v. *Fox,* 446 F. 2d 1091, 1096 (4th Cir. 1971), *cert. denied,* 404 U. S. 994 (1971) (a challenge to a college regulation on first amendment grounds):

> "Courts must take into consideration both 'the special characteristics of the school environment,' and that the regulation of student conduct is ordinarily the prerogative of the college authorities, with judicial intervention only when the circumstances are such as to 'directly and sharply implicate basic constitutional values.' For these reasons, the 'precedents about the meaning of the first amendment in other areas of life can (not) be indiscriminately transferred to the university setting.'"

The equal protection clause does not create substantive constitutional rights, *San Antonio Independent School District* v. *Rodriguez,* —— U. S. ——, 93 S. Ct. 1278 (1973), and the only "right" at issue here is the "right" to have self-regulated dormitory hours. Respondents submit that the regulation of that "right" in the circumstances of this case does not

impair any basic constitutional privilege. To the contrary, the regulation of dormitory hours concerns a matter peculiarly related to the University's internal administrative affairs and is not a proper subject for judicial intervention under the principles enunciated in *Epperson.*

In this regard we note those decisions involving rules regulating the length or style of hair of male students in which this Court has uniformly denied certiorari regardless of the result reached in the appellate court as to the validity of such rules. See *Lansdale* v. *Tyler Junior College,* 470 F. 2d 659 (5th Cir. 1972), *cert. denied,* —— U. S. ——, 93 S. Ct. 2268 (1973) (college hair style regulation invalidated); *Karr* v. *Schmidt,* 460 F. 2d 609 (5th Cir. 1972), *cert. denied,* 409 U. S. 989 (1972) (hair style regulation upheld); *Freeman* v. *Flake,* 448 F. 2d 258 (10th Cir. 1971), *cert. denied,* 405 U. S. 1032 (1972) (hair style regulation upheld); *King* v. *Saddleback Junior College District,* 445 F. 2d 932 (9th Cir. 1971), *cert. denied,* 404 U. S. 979 (1971) and *Olff* v. *East Side Union High School District,* 445 F. 2d 932 (9th Cir. 1971), *cert. denied,* 404 U. S. 1042 (1972) (hair style regulations upheld where the Court noted that the fact the regulations applied to males but not to females was not a difference in treatment or classification creating any substantial constitutional question); *Stevenson* v. *Board of Education of Wheeler County, Georgia,* 426 F. 2d 1154 (5th Cir. 1970), *cert. denied,* 400 U. S. 957 (1970) (regulation requiring student to shave upheld);

Jackson v. *Dorrier,* 424 F. 2d 213 (6th Cir. 1970), *cert. denied,* 400 U. S. 850 (1970) (hair style regulation upheld); *Breen* v. *Kahl,* 419 F. 2d 1034 (7th Cir. 1969), *cert. denied,* 398 U. S. 937 (1970) (hair style regulation invalidated); and *Ferrell* v. *Dallas Independent School District,* 392 F. 2d 69 7(5th Cir. 1968), *cert. denied,* 393 U. S. 856 (1968) (hair style regulation upheld). If reasonable rules regulating the hair style of male students do not, in the context of the school environment, implicate a basic constitutional value, it would seem even more evident that reasonable rules regulating dormitory hours for female students do not implicate basic constitutional values warranting judicial intervention.

II.

A Public University May, Consistent With the Equal Protection Clause of the Fourteenth Amendment, Establish Different Dormitory Hour Regulations for Male and Female Students.

Assuming that petitioner's claim is cognizable, the standard by which the University's regulation is to be tested under the equal protection clause must be determined. Although described in a variety of ways, the traditional measure of equal protection invalidates a classification only when that classification is without any rational basis. See, *e.g., Schlib* v. *Kuebel,* 404 U. S. 357 (1971); *Dandridge* v. *Williams,* 397 U. S. 471 (1970); *McDonald* v. *Board of Election Commissioners,* 394 U. S. 802 (1969).

This measure of equal protection has frequently been applied in testing and upholding classifications based upon sex. See, *e.g.*, *Hoyt* v. *Florida*, 368 U. S. 57 (1961); *Goesaert* v. *Cleary*, 335 U. S. 464 (1948); *Schattman* v. *Texas Employment Commission*, 459 F. 2d 32 (5th Cir. 1972), *cert. denied*, 409 U. S. 1107 (1973); *Miskunas* v. *Union Carbide Corp.*, 399 F. 2d 847 (7th Cir. 1968), *cert. denied*, 393 U. S. 1066 (1969); *Gruenwald* v. *Gardner*, 390 F. 2d 591 (2d Cir. 1968), *cert. denied*, 393 U. S. 982 (1968); *Williams* v. *McNair*, 316 F. Supp. 134 (D.C. S.C. 1970), *aff'd*, 401 U. S. 951 (1971). More recently, in *Reed* v. *Reed*, 404 U. S. 71 (1971), this measure of equal protection was applied in holding unconstitutional a statutory preference of males over females as between persons otherwise equally entitled to administer an estate. This Court in a unanimous decision stated the question to be "whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced * * *." *Id.* at 76. Here, the Court below correctly applied the standard as stated in *Reed* and concluded that the dormitory hour regulations adopted by the Board of Regents were rationally related to the advancement of a legitimate state objective.

Although recognizing that a majority of this Court has not adopted the view that sex-based classifications are inherently suspect, petitioner, relying on *Frontiero* v. *Richardson*, —— U. S. ——, 93 S. Ct. 1764 (1973), contends that the Court *should* hold all sex-based classifications inherently suspect and therefore subject

to strict judicial scrutiny. Respondents submit that this case is not an appropriate vehicle for the consideration of that question.

Frontiero held to be an unconstitutional discrimination against servicewomen a federal statute providing that a spouse of a male member of the uniformed services was a dependent for the purpose of obtaining increased quarter allowances and medical and dental benefits but that the spouse of a female member was not a dependent unless he was in fact dependent for over one-half of his support. In announcing the judgment of the Court, Justice Brennan stated that what differentiates sex from nonsuspect statutes, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to an ability to perform or contribute to society. Although this characterization may be true with respect to many sex-based classifications, this is not such a case. Here, the physical attributes of most young female college students and the risks to which females are peculiarly subject does bear a direct relation to the safety objective of the regulation. Moreover, as previously noted, this case arises in the special context of the school environment and involves no actual deprivation of any substantial constitutional right. Suc ha situation is therefore distinguishable from that existent in *Reed* and *Frontiero* where females were in essence being arbitrarily deprived of the right to employment or employment benefits. As such, this case does not furnish an appropriate framework within which to decide

whether all sex-based classifications should be regarded as suspect.[2]

Turning to the decision below, the Court of Appeals concluded that a difference in sex bears a rational relationship to the University's safety objective in establishing dormitory hour regulations in that there admittedly are physical differences between males and females which render females less capable than males of protecting themselves in a case of criminal attack; the risk of being subjected to a criminal attack, particularly in the case of sexual crimes, is greater in the case of females than males. Certain possible consequences of a sexual attack in the case of females are, of course, non-existent with males. Due to these inherent differences male and female students are not similarly situated with respect to the University's objective in establishing dormitory hour regulations. The regulations were not promulgated, as petitioner

[2]Respondents do not concede that the regulations would be unconstitutional under the test of strict judicial scrutiny. Where that test is applicable, a state must demonstrate that its laws are necessary to promote a compelling state interest; the state cannot choose means which unnecessarily restrict constitutionally protected activities, and the statute must be drawn with precision and tailored to serve legitimate objectives; if there are other reasonable ways to achieve those goals with a lesser burden on constitutionally protected activities, a state may not choose the way of greater interference. *Dunn* v. *Blumstein*, 405 U. S. 330 (1972). Providing for the health, safety, education, and welfare of female students clearly is a subject in which the state has a compelling interest. Regulations of this or of a similar nature are necessary to promote that interest, and a legitimate purpose independent of sexual discrimination prompts the establishment of such regulations. Application of the regulations to male students does not constitute another reasonable way of achieving its objective because the particular regulations involved have been found by the University not to be necessary to the promotion of the University's interest in the safety of its male students.

suggests, on the basis that male students are more capable of making decisions than female students or because female students are incapable of making their own judgments. To the contrary, the regulations apply to female students not because they are females but because of the recognition that the risks involved and the possible consequences which may result therefrom are particularly applicable to female students.[3]

Petitioner contends that the dormitory hour regulations are not reasonably related to the interest of safety in that different hours are established for different days and, after the first semester, female students are allowed self-regulated hours with parental approval. A public university should be permitted to establish a flexible dormitory hour regulation which achieves a rough accommodation of varying interests including that of safety in an effort to arrive at a practical and workable solution. Moreover, imposition of dormitory hours, regardless of whether the time varies with the days of the week, establishes a means to enable the University to promptly commence an investigation to ascertain whether any female student who has not reported to her dormitory is safe. Furthermore, the University could reasonably conclude that the risk is greatest in the case of the youngest female students and that thereafter the University will abide by the wishes of the parents who consent to their daughters having self-regulated hours. Under the

[3]We note that petitioner does not challenge either the propriety of adopting dormitory hour regulations or the reasonableness of the particular regulations involved here except for the fact that such regulations do not apply to male as well as female students.

equal protection clause, reform may take one step at a time addressing itself to the phase of the problem which seems most acute; a state need not choose between attacking every aspect of a problem or not attacking the problem at all. See, *e.g., Dandridge* v. *Williams,* 397 U. S. 471 (1970); *McDonald* v. *Board of Election Commissioners,* 394 U. S. 802 (1969); *Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955).

Although the Court of Appeals justified the University's regulations primarily upon the ground that they were rationally related to the effectuation of a valid safety objective, the district court also found that the great majority of parents of those female students who attend Eastern Kentucky University expect and demand that the University have dormitory hour regulations (Pet. Appendix, p. 28). Given the finding that the majority of parents expect and demand that the University have such regulations, it would be an unwarranted construction of the equal protection clause to hold that a university cannot adopt such regulations pursuant to the demands and expectations of parents who send their daughters to college and who generally finance, at least in part, such attendance. Moreover, as noted by the Court of Appeals, many colleges and universities apply dormitory hour regulations to female students, 475 F. 2d at 708. Practices recognized by reputable authorities in the field as reasonable and relevant to the school function and necessary to the good order and supervision of the school merit consideration in passing upon the validity of a classification. See *Williams* v. *McNair,* 316

F. Supp. 134 (D.C. S.C. 1970), *aff'd*, 401 U. S. 951 (1971) (the district court upheld legislation establishing "single-sex" institutions relying upon the opinion of educational experts as to the advantages of such institutions); *San Antonio Independent School District* v. *Rodriguez*, —— U. S. ——, 93 S. Ct. 1278 (1973) (in upholding a plan for financing public education the majority opinion noted its unwillingness to assume a level of wisdom superior to that of legislators, scholars and educational authorities who viewed the plan as an enlightened approach to the problem).

CONCLUSION

In challenging the dormitory hour regulations promulgated by respondents, this case does not raise any important question of federal law meriting consideration or resolution by this Court. The decision of the Court of Appeals does not conflict with applicable decisions of this Court or with the decision of another court of appeals on the same subject matter. The petition for certiorari should be denied.

Respectfully submitted,

BERT T. COMBS
CHARLES R. SIMONS
1700 Kentucky Home Life Building
Louisville, Kentucky 40202

JOHN W. PALMORE
P. O. Box 727
Eastern Kentucky University
Richmond, Kentucky 40475

Counsel for Respondents